No. 97-5870
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON RAY PHINNEY,	)	FILED
	)	Oct. 29, 1997
Plaintiff-Appellant,	)	Leonard Green
	)	Clerk
v.	)	
	)	ORDER
FIRST AMERICAN NATIONAL BANK;	)	
FIRST AMERICAN CORPORATION	)	
(TENN);	)	Not Recommended
DOES 1-100, INCLUSIVE,	)	for Full-Text
	)	Publication
Defendants-Appellees.	)	

Before: KEITH, BOGGS, and NORRIS, Circuit Judges.

This matter is before the court upon consideration of the Don Ray Phinney's response to this court's order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal. Phinney responded stating that he has a 60 day appeal period because United States District Court Judge Wiseman was intended to be one of the John Does in the case as evidenced by the RICO Statement.

It appears from the documents before the court that the appellant filed a complaint on August 3, 1994 in the district court naming the parties listed in the caption of this order. Service of the complaint was made upon First American National Bank and First American Corporation. Judge Wiseman was not named as a party in the caption of the complaint as required by Fed. R. Civ. P. 10(a). Although the RICO Statement filed on April 28, 1995 mentions actions of Judge Wiseman in a previous district court case, no amended complaint was filed adding Judge Wiseman as a party.

Judge Wiseman was not named as a defendant in the action and Phinney is not entitled to a 60 day appeal period. *See* Fed. R. App. P. 4(a)(1).

Phinney appealed on July 3, 1997 from the order entered on May 8, 1997 denying an extension of time and vacating a ruling on a late motion to reconsider. The notice of appeal was filed 24 days late. *See* Fed. R. App. P. 4(a) and 26(a).

The failure of appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Fed. R. App. P. 4(a) is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam). Fed. R. App. P. 26(b) specifically provides that this court cannot enlarge the time for filing a notice of appeal.

Accordingly, it is ordered that the appeal is dismissed for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

No. 97-5870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON RAY PHINNEY, Plaintiff-Appellant, *v.* FIRST AMERICAN NATIONAL BANK; FIRST AMERICAN CORPORATION (TENN); DOES 1-100, INCLUSIVE, Defendants-Appellees.	)	FILED August 8, 1997 Leonard Green Clerk ORDER

Appellant is appealing from the order denying reconsideration and an extension of time.

It appears from the documents before the court that the order appealed was entered May 8, 1997. The notice of appeal filed on July 3, 1997 was late. *See* Fed. R. App. P. 4(a) and 26(a).

It further appears from the record that appellant did not apply to the district court for an extension of time within which to file the notice of appeal late, due to excusable neglect, and it appears that no such extension of time has been granted by the district court.

It is therefore ordered that appellant show cause in writing not later than twenty-one days from the file date of this order why the appeal should not be dismissed for lack of jurisdiction.

It is further ordered that the briefing schedule be held in abeyance pending the resolution of the question of jurisdiction.

ENTERED PURSUANT TO RULE 8(b),
RULES OF THE SIXTH CIRCUIT
/s/ Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DON RAY PHINNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3-94-0639
	)	JUDGE ECHOLS
FIRST AMERICAN NATIONAL BANK, *et al.*,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM

Plaintiff filed this suit under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 ("RICO"), seeking to recover damages from Defendants based on allegations that Defendants joined together with the judge presiding over a prior civil suit between Plaintiff and Defendants to form an enterprise with the purpose of depriving Plaintiff of a fair and just trial. On August 31, 1995, Defendants filed a Motion for Summary Judgment (Docket Entry No. 23) and a Motion for Sanctions (Docket Entry No. 19). Five months later, Plaintiff filed a Motion requesting additional time within which to file a response to Defendants' pending Motions (Docket Entry No. 47). On February 23, 1996, the Court granted the motion and gave Plaintiff until March 20, 1996, to respond to Defendants' Motion (Docket Entry No. 51). On March 28, 1996, Plaintiff [filed – sic] another Motion (Docket Entry No. 53) again requesting additional time to respond to Defendants' Motion for Summary Judgment and Motion for Sanctions. On March 29, 1996, this Court entered an Order (Docket Entry No. 55) denying Plaintiff's request. In that Order, the Court also granted Defendants' Motion

for Summary Judgment and granted the Motion for Sanctions to the extent that Plaintiff was prohibited from filing further lawsuits against Defendants arising from the facts upon which this suit is based without leave of Court. On April 12, 1996, the Court received a letter from Plaintiff dated April 10, 1996, which was not docketed, regarding the Court's ruling on Defendants' Motion for Summary Judgment and Motion for Sanctions. On April 22, 1996, Plaintiff filed a Motion to Reconsider (Docket Entry No. 57) which the Court denied in an Order (Docket Entry No. 64) entered on July 30, 1996. Plaintiff filed a Notice of Appeal (Docket Entry No. 65) on August 22, 1996.

On March 31, 1997, this Court received an Order (Docket Entry No. 66) entered by the United States Court of Appeals of the Sixth Circuit. In that Order, the Sixth Circuit remanded this case for a determination of whether the letter received by this Court on April 12, 1996, was sufficient to be treated as a motion to reconsider or whether it should have been treated as a motion for an extension of time. The Order also directed that, should the Court determine that the letter was sufficient to be a motion to reconsider or a motion for extension of time, such letter should be entered on the Court's docket sheet and a ruling made on the matter.

The Court has reviewed the letter submitted by Plaintiff and finds that this letter should be treated as a motion for extension of time to file a motion to reconsider. Plaintiff informed the Court that his father had passed away. He then stated that:

> I have just finished making funeral arrangements. Now, I am going to sit down and respond to your ruling. The time for that ran yesterday. Does it seems [sic] reasonable to you to allow me an additional time to respond? I need that time and ask that you grant me ten days from today to respond to your ruling and the Motion for Summary Judgment and Sanctions. There are too many factual errors to raise at this time. I am only asking now that I be allowed additional time to respond.
> . . .

> Please give me the reasonable time I need to prove to Your Honor that a case does in fact exist and that there are real issues to go to the jury. Given the time, I will not lose the Motion for Summary Judgment and Sanctions. (emphasis added).

Having found that the letter should be construed as a motion for extension of time within which to ask the Court to reconsider its prior Order granting Summary Judgment to Defendants, the Court finds that such Motion should be denied. Plaintiff requests the additional time to challenge alleged errors made by this Court in its original Order granting Defendants' Motion for Summary Judgment, which was entered on March 29, 1996. In essence, Plaintiff seeks additional time in which to file a Motion to Alter or Amend the Judgment under Federal Rule of Civil Procedure 59(e), which provides such motion must be filed within ten days after entry of judgment.[1] This rule gives the plaintiff a ten-day window within which to file a motion. Under Federal Rule of Civil Procedure 6(b), a federal district court "may not extend the time for taking any action under . . . 59 (b)." Fed. R. Civ. Pro. 6(b).[2] As such, this Court is without authority to grant a motion for extension of time to file a motion to reconsider.

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[1] The Court assumes that Plaintiff is not seeking relief under Federal Rule of Civil Procedure 60(b) as he does not allege that there is new evidence, nor does he allege mistake, inadvertence or inexcusable neglect. *See* Fed. R. Civ. Pro. 60(b) ("On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, . . . excusable neglect, . . . newly discovered evidence", etc.). Rather, Plaintiff asserts that the Court failed to consider evidence that was attached to Defendants' original Motion.

[2] Plaintiff also requests that he be given additional time to respond to Defendants' Motion for Summary Judgment. However, as the Court has already ruled on the merits of Defendants' Motion, and as Plaintiff had made similar requests in the past which the Court also ruled on, it is unnecessary for the Court to consider this request.

Even assuming that this Court was vested which [with – sic] the authority to extend the time for filing a motion to reconsider, the Motion should nevertheless be denied. Throughout the pendency of these proceedings, Plaintiff has continuously engaged in dilatory tactics.[3] He continuously failed to respond to Defendants' Motion for Summary Judgment despite the fact that he was granted generous extensions of time for a variety of reasons. In fact, Plaintiff had approximately seven months to respond to Defendants' Motion, but failed to do so.[4] In his letter of April 10, 1996, requesting an extension for time, Plaintiff asserts that there are facts necessary for the Court's full consideration of the Motion for Summary Judgment that he has been unable to submit due to the death of his father. While the Court is sympathetic to Plaintiff's loss, such loss does not explain his repeated failure to respond as promised and to supply the Court with such information in the preceding seven months. Accordingly, Plaintiff's Motion for Extension of Time is DENIED.

In the event that Plaintiff's April 10, 1996, letter could be construed as a timely filed motion to reconsider, a conclusion which is not supported by the language of the letter, such motion would likewise be denied. In the letter, Plaintiff asserts that the Court erred in concluding that his action was barred by the statute of limitations because Judge Davis [sic] of the United States District Court for the Central District of California ("California District Court") concluded that his action was not barred. However, as noted in the original Order dismissing Plaintiff's suit, conclusions of the California

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[3] In addition to the repeated requests for extensions of time filed throughout the course of this litigation, (*see* Docket Entry Nos. 8, 15, 27, 35, 47, and 53), this Court's Courtroom Deputy has received a number of telephone calls from Plaintiff and Plaintiff's representatives requesting additional extensions of time in which to respond to the pending Motion for Summary Judgment.

[4] Plaintiff was well aware of the considerable length of time this Motion had been pending as evidenced by the Order by the Magistrate Judge of January 22, 1996, specifically directing him to file a motion for an extension of time to respond to Defendants' Motion for Summary Judgment, (*see* Docket Entry No. 44), and the numerous calls to this Court's Courtroom Deputy.

District Court do not have res judicata effect on this Court because the case was dismissed for lack of personal jurisdiction. *Cf. Ohio State Pharmaceutical Assoc. v. Creasy*, 587 F. Supp. 698, 704 (S.D. Ohio 1984). Moreover, the Court is still of the opinion that Plaintiff's RICO claim is barred. The statute of limitations for civil claims filed under RICO is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). Plaintiff filed this Complaint on August 3, 1994. As discussed in this Court's Order dismissing this cause of action, the latest date that the RICO limitations period could have begun to run is May 12, 1989, which means this action was not filed until approximately 15 months after the limitations period had expired. The Court recognizes that it is possible that Plaintiff's claim may have been tolled during the pendency of the matter in the California District Court from August 12, 1992, until December 12, 1992, as such action was ultimately dismissed for lack of personal jurisdiction.[5] *See Fox v. Eaton Corp.*, 615 F.2d 716, 719 (6th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981) (holding that, generally, filing in a court where it is unclear whether jurisdiction exists, tolls the statute of limitations).[6] However, the period during which Plaintiff's action was tolled is insufficient to bring the action within the limitations period and Plaintiff's claim is thus barred.

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[5] The California District Court did grant Plaintiff's Motion to Reconsider in part, but affirmed its original decision of December 12, 1992, dismissing Plaintiff's case for lack of jurisdiction. As such, the tolling period ended on December 12, 1992, the date that the case was dismissed.

[6] Plaintiff's action was not tolled during the period of August 12, 1991, to June 8, 1992, where it was dismissed for failure to effect timely service of the summons and the complaint, as Defendants did not receive adequate notice of the complaint. *See Herb v. Petcairn* [sic], 325 U.S. 77, 79 (1945) (holding that "when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to a final judgment without issuance of new initial process, it is enough to commence the action within the federal statute.").

As discussed above, this Court has already considered the merits of Plaintiff's claim that the Court erred in granting Defendants' Motion for Summary Judgment in the context of Plaintiff's Motion to Reconsider filed on April 22, 1996. Although the Court is of the opinion that its original decision was correct in denying Plaintiff's Motion to Reconsider on the merits, as noted by the Court of Appeals, this Court was without authority to grant Plaintiff an extension of time in which he could file a Motion to Reconsider. The Motion to Reconsider was filed on April 22, 1996, and, even under the most liberal reading of the Federal Rules of Civil Procedure, *see* Fed. R. Civ. Pro. 6 (a, e), the deadline for such motion expired on April 17, 1996. Accordingly, the Memorandum and Order entered July 30, 1996 (Docket Entry Nos. 63 and 64) are hereby VACATED.

For the foregoing reasons, the Court finds that Plaintiff's letter dated April 10, 1996, shall be treated as a Motion for an Extension of Time, and the Clerk is directed to docket the letter as such. Furthermore, the Court hereby DENIES Plaintiff's Motion for an Extension of Time.

/s/ ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 5-8-97 by /s/ S. Isom. (67)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DON RAY PHINNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3-94-0639
	)	JUDGE ECHOLS
FIRST AMERICAN NATIONAL BANK, *et al.*,	)	
	)	
	)	
Defendants.	)	

ORDER

Plaintiff filed this suit under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 ("RICO"), seeking to recover damages from Defendants based on allegations that Defendants joined together with the judge presiding over a prior civil suit between Plaintiff and Defendants to form an enterprise with the purpose of depriving Plaintiff of a fair and just trial. On August 31, 1995, Defendants filed a Motion for Summary Judgment (Docket Entry No. 23) and a Motion for Sanctions (Docket Entry No. 19). On March 29, 1996, this Court entered an Order (Docket Entry No. 55) which granted Defendants' Motion for Summary Judgment and granted the Motion for Sanctions to the extent that Plaintiff was prohibited from filing further lawsuits against Defendants arising from the facts upon which this suit is based without leave of Court. On April 12, 1996, the Court received a letter from Plaintiff dated April 10, 1996, which was not docketed, regarding the Court's ruling on Defendants' Motion for Summary Judgment and Motion for Sanctions. On April 22, 1996, Plaintiff filed a Motion to Reconsider (Docket Entry No. 57) which the Court denied on July 30, 1996

(Docket Entry No. 64). Plaintiff filed a Notice of Appeal on August 22, 1996 (Docket Entry No. 65).

On March 31, 1997, this Court received an Order (Docket Entry No. 66) entered by the United States Court of Appeals of the Sixth Circuit. In that Order, the Sixth Circuit remanded this case for a determination of whether the letter received by this Court on April 12, 1996, was sufficient to be treated as a motion to reconsider or whether it should have been treated as a motion for an extension of time. The Order also directed that, should the Court determine that the letter was sufficient to be a motion to reconsider or a motion for extension of time, such letter should be entered on the Court's docket sheet and a ruling made on the matter.

For the reasons stated in the Memorandum filed contemporaneously herewith, the Court finds that Plaintiff's letter dated April 10, 1996, shall be treated as a Motion for an Extension of Time, and the Clerk is directed to docket the letter as such. Furthermore, the Court hereby DENIES Plaintiff's Motion for Extension of Time. Finally, as the Court erroneously ruled on Plaintiff's Motion to Reconsider, the Memorandum and Order entered July 30, 1996 (Docket Entry Nos. 63 and 64) are hereby VACATED.

It is so ORDERED.

/s/ ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 5-8-97 by /s/ S. Isom. (68)

No. 96-6222

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON RAY PHINNEY,	)	FILED
	)	March 28, 1997
Plaintiff-Appellant,	)	Leonard Green
	)	Clerk
v.	)	
	)	ORDER
FIRST AMERICAN NATIONAL BANK;	)	
FIRST AMERICAN CORPORATION	)	
(TENN);	)	
DOES 1-100, INCLUSIVE,	)	
	)	
Defendants-Appellees.	)	

This court entered an order on February 3, 1997, directing the appellant to show cause why his appeal should not be dismissed for lack of jurisdiction. The order specifically stated that the motion for reconsideration filed on April 22 from the April 2, 1996, decision did not toll the appeal period. Appellant responded stating that the district court docket sheet does not reflect a letter that he mailed to the district court judge on April 10, 1996. Appellant argues that the district court must have granted his motion for an extension because the order of the district court denying the motion to reconsider did not state that it was filed late. Appellant also argues that the April 10, 1996, letter may be treated as a Fed. R. Civ. P. 59 or Fed. R. Civ. P. 60 motion.

The April 10, 1996, letter sought an extension of time to respond to the district court's decision. However, the district court lacks authority to extend the time for filing time-tolling motions. Fed. R. Civ. P. 6(b). No extension of time was granted by the district court. However, the April 10, 1996, letter did state that the appellant believed the court made its decision relying on an incorrect

statement of the facts and asked for additional time to develop matters for the court and respond to the district court's order.

It is ordered that the case is remanded to the district court for a determination whether the April 10, 1996, letter was sufficient to be treated as a motion to reconsider the decision of the district court or whether it should be treated as a request for an extension of time. If the district court determines that the letter should be treated as a motion for an extension of time or a motion to reconsider, it should be entered on the district court docket sheet and a ruling made on the matter.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk